Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1979

No. 79-1133

SANDRA LOU CLAWSON, Administratrix of the Estate of RONALD EUGENE CLAWSON, Deceased, and SANDRA LOU CLAWSON, in her own right,

*Petitioner,*

*vs.*

INTERNATIONAL HARVESTER COMPANY,

*vs.*

GRANT STEEL CORPORATION, a corporation.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## OPINIONS BELOW

In a memorandum opinion issued April 19, 1979, the United States District Court for the Western District of Pennsylvania granted International Harvester's motion for summary judgment at Civil Action No. 76-1325 (Appendix A). Petitioner appealed. The United States Court of Appeals for the

Third Circuit at No. 79-1709 after considering the case on the brief only, entered a judgment order affirming the judgment of the district court (Appendix B).

## JURISDICTION

Judgment in the form of an affirmance of the order of the United States District Court for the Western District of Pennsylvania granting respondent International Harvester's summary judgment was entered by the Court of Appeals for the Third Circuit on October 17, 1979. Petition for rehearing was denied on November 9, 1979. A certified judgment order was issued on behalf of a formal mandate by the court of appeals on November 20, 1979 (Appendix C).

This Court has jurisdiction to review the judgment as authorized by 28 U.S.C. §1254(1) which provides that cases in the court of appeals may be reviewed by this Court "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Petition is timely in accordance with 28 U.S.C. §2102(c) which authorizes writs of certiorari intended to bring any judgment or decree in the civil action, suit or proceeding before the Supreme Court for review mandating application within ninety (90) days after entry of such judgment or decree.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the burden in a summary judgment proceeding is on the non-moving party under Federal Rules of Civil Procedure Rule 56?

*Answered in the affirmative by the court below.*

2. Whether the respondent International Harvester as a matter of law, was relieved of liability because an intervenor attempted unsuccessfully to correct safety defects present on a machine supplied by the respondent?



*Answered in the affirmative by the court below.*

3. Whether it is the function of the trial court in a summary judgment proceeding under Rule 56 of the Federal Rules of Civil Procedure to adjudicate genuine factual issues?

*Answered in the affirmative by the court below.*

4. Whether a trial court in a summary judgment proceeding under Rule 56 should draw all inferences of fact from the proofs proffered at the hearing in favor of the movant and against the party opposing the motion?

*Answered in the affirmative by the court below.*

5. Whether the trial court's application of Federal Rules of Civil Procedure Rule 56 infringed upon Sandra Lou Clawson's right to a jury trial under the Seventh Amendment where the trial court misplaced the burden, exceeded its function and misinterpreted the applicable law in granting respondent's motion for summary judgment?

## CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Seventh Amendment of the Constitution of the United States of America:

> TRIAL BY JURY IN CIVIL CASES.
>
> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Rule 56:

## RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated On Motion. If on motion under this rule judgment is not



rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made In Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

## STATEMENT OF THE CASE

Ronald Clawson was employed by Grant Steel Corporation as a highlift helper. On November 11, 1975, he was riding on the side of a gondola car (a railroad car), which was being pushed by a highlift at walking speed. A fellow employee was operating another highlift known as a Hough payloader. The fellow employee backed the payloader into the gondola car and crushed Ronald Clawson, whose back was to the payloader, up against the side of the railroad car.

The Hough payloader was designed and manufactured by International Harvester. It is a highlift with a cab on it in which the operator sits while driving it. The cab has a rear window behind the driver and a windshield in front of the driver. As



manufactured by International Harvester, the payloader had no rear view mirrors, no side view mirrors and no buzzer designed to sound when the payloader was purchased from International Harvester by a distributor, State Equipment Corporation, and sold by the distributor to the decedent's employer. State Equipment had installed a back up buzzer and side view mirrors on each side of the cab but did not install a rear view mirror. These features were present at the time of the accident. There is conflicting evidence of record as to the sufficiency of the side view mirrors and the effectiveness of the buzzer.

Civil action was initiated by the petitioner Sandra Lou Clawson, Administratrix of the Estate of Ronald Eugene Clawson, deceased, and Sandra Lou Clawson, individually, in her own right, against the respondent International Harvester Co. The action was brought to recover damages under the Wrongful Death and Survival Acts of Pennsylvania on behalf of the widow, heirs, and next of kin. The basis of the petitioner's causes of action against the respondent are: respondent's negligence in designing, manufacturing and supplying a defective payloader; strict liability under §402A of the Restatement of Torts 2nd, as adopted by the Third Circuit of the United States Court within the circuit and by the courts of the Commonwealth of Pennsylvania; and breach of express and implied warranties of merchantability and fitness provided by the Pennsylvania Uniform Commercial Code (12A P.C.S.A. §2-313, *et seq.*).

Federal jurisdiction was based upon diversity of citizenship and an amount in controversy in excess of ten thousand dollars ($10,000), exclusive of interest and costs.

After discovery and pre-trial conferences, International Harvester Co., filed a motion for summary judgment.

The United States District Court for the Western District of Pennsylvania held that no genuine issue as to any material facts existed with regard to any act or omission on the part of

International Harvester which may have proximately caused the death of Ronald Clawson and that as a matter of law, International Harvester was not responsible for this accident.

Sandra Lou Clawson appealed from a final judgment of the United States District Court of Pennsylvania (entered pursuant to an order granting respondent International Harvester's motion for summary judgment) directing dismissal of petitioner's actions.

By judgment order without opinion, the United States Court of Appeals for the Third Circuit affirmed the decision of the lower court. This petition for a writ of certiorari follows.

## REASONS FOR GRANTING THE WRIT

The district court committed two fundamental errors of law when it held that:

> "Plaintiff therefore has the burden of presenting a genuine issue of material fact regarding the absence or inadequacy of these safety devices." (R622a).

First, the respondent International Harvester filed the motion for summary judgment. It was their burden to show the absence of any genuine issues as to all the material facts, which under applicable principles of substance law entitle them to judgment as a matter of law. *Weinberger v. Hunson, Westcott & Dunning,* 412 U.S. 609, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). *See also,* Moore's Federal Practice §56.15[3].

Secondly, the safety devices referred to were installed by State Equipment, not a party to this action, in an unsuccessful attempt to correct the safety defects already present on the payloader. The district court mistakenly required the petitioner



not only to bear the burden of showing that the payloader was defective, but that devices put on the machine by a third party, were not only ineffective but defective within the meaning of §402A. This was clear contravention of existing law, holding that a manufacturer of a machine, defective when sold, is not relieved of liability because someone else tries to make it safe. *Capasso v. Minster Machine Co., Inc.,* 532 F. 2d 952 (3d Cir. 1976); *Heckman v. Federal Press,* 587 F. 2d 612 (3d Cir. 1978).

The court not only misplaced the burden, but confused the issue of proximate cause with substantial change.

The lower court compounded its error. It justified its conclusion that there were no issues of material fact by first determining as a factual matter that even though the petitioner alleged a blind spot to the rear of the payloader, "the gondola could not have been in the so called blind spot." Not only did the court exceed its proper function, but, it also failed to resolve all doubts against the moving party. It resolved this factual issue against the petitioner in spite of evidence that:

(a) A blind spot existed from the rear of the payloader to a point 15 feet behind the payloader (R372a);

(b) The gondola car was directly to the rear of the payloader when the payloader backed into it, crushing Ronald Clawson between the side of the car and the rear end of the payloader (R358a-362a).

The court limits the parameters of the blind spot based on the statements of record that a person with his head turned looking directly to the rear would be able to see a gondola car over the rear edge of the payloader. It ignores evidence of record that visibility was worse when using the mirrors, that when using mirrors, "all you would see is the side of the highlift," and most importantly, that the operator of the payloader never turned directly around to look out the rear window (R317a, 361a).

In erroneously requiring the petitioner to prove the buzzer was defective, the court decided that petitioner presented no issue of material fact as to whether the buzzer was ineffective and refers to the deposition of Mr. Judy. Mr. Judy was a payloader operator and extremely familiar with the payloader in question as he had operated it on numerous occasions. He stated that the buzzer continually malfunctioned because the "spring trigger that triggers the beeper would get bent when you put it in reverse." He also said it was not working at the time of the accident (R311a).

The district court determined that International Harvester had no duty to warn. In doing so it again misplaced the burden by requiring petitioner to show that an adequate warning would have caused the individual in question to act differently. The district court by-passed the proper issue; namely, whether the respondent could show that there was no issue of fact concerning the back-up warning or its effect. In reaching this conclusion, the court again made findings of fact which are not consistent with the evidence. The petitioner contended that the respondent should have warned the distributor, the buyer and the driver of the dangers of reverse operation without proper mirrors and an effective back-up alarm. The court inferred that International Harvester did not need to warn them because side view mirrors and a back-up buzzer were on the payloader. That is, however, precisely why they had to warn them. It was certainly foreseeable that someone might attempt to install these devices. Given that knowledge, International Harvester, was required to warn the distributor, buyer and user, either that the operator always turn around and look back, which was the only method Mr. Judy testified to as safe, or that proper wide angle mirrors, including a center rear view mirror in the cab and an integrated buzzer system, be installed on the machine to eliminate both blind spots and warn anyone behind the machine that it was in reverse.

The district court:

(1) misplaced the burden;



(2) decided disputed factual issues;

(3) failed to resolve all doubts in favor of the non-moving party;

(4) misapplied the law.

It effectively denied Sandra Lou Clawson her Seventh Amendment constitutional right to have her case placed before a jury. There are genuine issues of fact to try.

The district court substituted trial by affidavit for trial by jury; substituted a motion for summary judgment for trial on the merits.

In affirming the district court, the court of appeals rendered a decision in direct conflict with prior decisions of this Court and with decisions of all other United States courts of appeals which uniformly hold that:

(1) The party moving for summary judgment has the burden of clearly establishing the lack of a triable issue of fact;

(2) The trial court should not act as a trier of facts;

(3) The trial court should resolve all doubts touching the existence of a genuine issue as to a material fact against a moving party;

(4) A defendant party who moves for summary judgment has the burden of clearly establishing his right thereto as a matter of law.

The lower court misapplied the law as set forth in *Capasso, supra. See Weinberger, supra; Adickes, supra;* and 6 Moore's Federal Practice generally and §56.27[1].

While summary judgment is a functional tool of the courts, it is also a "lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use." *Brunswick Corporation v. Vineberg,* 370 F. 2d 605, 612 (5th Cir. 1967). A district court's order which is "opaque and unilluminating as to either the relevant facts or the law with respect to the merits of the plaintiff's claim", should be set aside. *Solely v. Star & Herald Co.,* 390 F. 2d 364 (5th Cir. 1968); *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962).

Not only is the district court's order in the instant case "opaque and unilluminating", it is in direct contravention to established principles of law. In affirming the lower court decision, the court of appeals has sanctioned such a blatant departure from the accepted and usual course of proceedings as to call for an exercise of the Supreme Court's power of supervision.

## CONCLUSION

WHEREFORE, we respectfully request that this Court reverse the judgment of the Third Circuit in this case and remand the case for a trial on the merits and grant this petitioner her day in court.

Respectfully submitted,

s/ Louis M. Tarasi, Jr.

s/ Peter E. Ferraro

TARASI & TIGHE
*Attorneys for Petitioner*



## APPENDIX A — MEMORANDUM OPINION AND ORDER DATED APRIL 19, 1979

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-1325

SANDRA LOU CLAWSON, Administratrix of the Estate of RONALD EUGENE CLAWSON, Deceased, and SANDRA LOU CLAWSON, in her own right,

Plaintiff

vs.

INTERNATIONAL HARVESTER COMPANY,

Defendant

BARRON P. McCUNE, District Judge
April 9, 1979.

This is a diversity action to recover damages under the Wrongful Death and Survival Acts of Pennsylvania on behalf of the Estate of Ronald E. Clawson. The plaintiff, Sandra Lou Clawson, wife of the decedent, was appointed Administratrix of the Estate. Ronald Clawson died on November 11, 1975, as a result of injuries sustained in an industrial accident.

We consider a motion by the defendant, International Harvester Company, for summary judgment. Extensive discovery has been completed and pretrial conferences have been held at least twice.[1] The facts have been ascertained in great

1. Extensions of discovery time were granted five times for periods of 60 days or more.

detail and plaintiff has been given ample time to consult experts and an expert's report has been filed.

At the time of the accident Ronald Clawson was employed by Grant Steel Corporation as a highlift helper. On November 11, 1975, he was riding on the side of a gondola car (a railroad car), which was being pushed by a highlift through the plant. A fellow employee was operating another highlift known as a "Hough Payloader." The fellow employee backed the payloader into the passing gondola car and fatally crushed Ronald Clawson.

The Hough Payloader was designed and manufactured by International Harvester. It is a highlift with a cab on it in which the operator sits while driving it. The cab has a rear window behind the driver and a windshield in front of the driver. As manufactured by International Harvester, the payloader had no rearview mirrors or buzzers designed to sound when the payloader was placed in reverse. This particular payloader was purchased from International Harvester by a distributor, State Equipment Company, and sold by the distributor to the decedent's employer. State Equipment had installed a backup buzzer and a rearview mirror on each side of the cab. These safety features were present on the payloader at the time of the accident.

On October 21, 1976, plaintiff filed a complaint against International Harvester.[2] Plaintiff alleged that Ronald Clawson's death resulted from the driver's inability to see to the rear while

2. Plaintiff later sought to amend the complaint to include State Equipment Company as a party. Plaintiff withdrew this motion, however, since the distributor was non-diverse. A suit is pending against this party in state court. International Harvester filed a third-party complaint against the decedent's employer. Summary judgment was granted in favor of the employer by virtue of the Workmen's Compensation Act of Pennsylvania, as amended.



operating the payloader in reverse which was caused by defendant's: (1) negligent design of the payloader, (2) defective design of the payloader, (3) failure to warn of the dangers of operating a payloader in reverse, and (4) breach of express and implied warranties of merchantability and fitness.

Specifically, plaintiff alleges that the Hough Payloader was defective when it left the hands of International Harvester because it did not contain mirrors and a buzzer which were necessary safety devices for reverse operation. Alternatively, plaintiff contends that although the distributor had installed rearview mirrors and a backup buzzer, the distributor's safety equipment was inadequate to supply what the manufacturer should have supplied. As will be noted hereinafter, plaintiff's expert does not state why they were inadequate. He merely states that they were inadequate.

Defendant's motion for summary judgment argues, *inter alia,* that defendant is not liable under Section 402A of the Restatement of Torts (2d), or for negligence or breach of warranty as a matter of law because the machine was not defective when it left the control of defendant. In any event, defendant argues, the very defects of which plaintiff complains were corrected by the distributor, who made a substantial change in the equipment, and finally there is no causal connection between the defects complained of and the accident.

Section 402A was adopted by the Supreme Court of Pennsylvania in *Webb v. Zern,* 422 Pa. 424 (1966).[3] Cases interpreting this section have held that lack of proper safety devices on a machine can constitute a defective design. *Schell v. AMF, Inc.,* 567 F.2d 1259 (3d Cir. 1977); *Azzarello v. Black*

3. Since this is a diversity case, we are controlled by the substantive law of Pennsylvania.

*Appendix A*

*Bros. Co.*, 391 A.2d 1020 (Pa. 1978). This type of defective design may subject the manufacturer of machinery to liability. *Heckman v. The Federal Press Co.*, 587 F.2d 612 (3d Cir. 1978).

Thus, the issue whether the Hough Payloader was rendered defective due to the absence of certain safety devices would ordinarily be one of fact and ordinarily the issue would be created by the conflicting opinions of experts.

In order for International Harvester to be liable the machine would, of necessity, be defective when it left the control of International Harvester. It is undisputed that State Equipment modified it by adding the devices already mentioned.

Recently, where two parties allegedly participated in the design and manufacture of a finished machine, the issue was analyzed in terms of "responsibility." *See Verge v. Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978).

In *Verge, supra,* the court held, as a matter of law, that the primary manufacturer of a multipurpose truck was not responsible for the lack of mirrors and a backup buzzer when a secondary manufacturer made substantial contributions to the finished product and added the devices. The court stated that responsibility for the absence of safety devices, where more than one party created the finished product, must be determined by examining at least three factors:

> "1. Trade Custom — at what stage is the device generally installed.
>
> 2. Relative Expertise — which party is best acquainted with the design problems and safety techniques in question.
>
> 3. Practicality — at what stage is installation of the device most feasible."



*Appendix A*

*Verge, supra,* at 387 (citations omitted).

The record in the present case contained insufficient evidence concerning these three factors for the purpose of summary judgment in favor of International Harvester on the issue of responsibility. The *Verge* opinion was not filed until August 8, 1978, and discovery was not conducted with *Verge* in mind. In fact, none of the briefs have mentioned *Verge.*

Defendant's motion for summary judgment also argues that International Harvester is not liable for the decedent's death because Ronald Clawson assumed the risk but this argument need not detain us because that would clearly be a question of fact.

I

The Proximate Cause Argument

Proximate causation is an essential element in plaintiff's cause of action on the grounds of negligence, strict liability, or breach of warranty. Plaintiff contends, we are reminded, that International Harvester's failure to install mirrors and a backup buzzer caused the death of Robert Clawson, but undisputed deposition testimony reveals that rearview mirrors and a backup buzzer were present on the payloader at the time of the accident.

Plaintiff, therefore, has the burden of presenting a genuine issue of material fact regarding the absence or inadequacy of these safety devices. In opposing defendant's motion for summary judgment, plaintiff may not rely on conclusory or unsupported allegations. *See* Fed. R. Civ. P. 56; *see generally* 6 Moore's Federal Practice §56.15[3]. Furthermore, summary judgment may not be defeated by the vague hope that more facts will be determined at trial. *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (S.D. N.Y. 1970).

*Appendix A*

Plaintiff presented no evidence indicating that the absence or inadequacy of the mirrors or the buzzer caused the accident. Plaintiff did state, in her answer to defendant's interrogatories, that a blind spot was created due to the absence of a third mirror which should have been located in the center of the cab. There is no evidence of record, however, which would place the decedent, at any time prior to the accident, within an alleged blind area. An examination of the report of plaintiff's expert shows a mere statement that the mirrors installed by the distributor were inadequate and improper. These conclusory statements contain no factual support either in the opinion or the record. The opinion contains no reference to a blind spot.

Since Clawson was riding on a gondola car at the time of the accident, we must assume that the driver of the Hough Payloader would not have hit the gondola, and therefore, would not have hit the decedent, if the driver had seen the gondola. It is undisputed that the driver did not see the gondola. It is also undisputed that the gondola is higher than the rear end of the Hough Payloader. (Deposition of Edmund Judy, pp. 30-31). Therefore, the view of the gondola could not have been obstructed by the rear end of the payloader. The gondola approached from a direction perpendicular to the payloader's reverse direction. The gondola could not have been in a so-called blind spot. It was obvious because of its size. It could have been seen had the operator looked out of the rear window and it could have been seen had the operator used the rearview mirrors unless they were defective in some manner. But there is no indication that they were too high or too low or that the glass was too dark or broken or anything else. There is no indication why they were inadequate.

Evidence relating to the alleged defective design of the backup buzzer is also insufficient as a matter of law. Plaintiff alleges possible design defects in the buzzer but she fails to present material facts supporting these allegations in opposition to defendant's motion for summary judgment.



*Appendix A*

Disputed testimony does indicate that the backup buzzer may not have been operating at the time of the accident However, this fact alone is insufficient to infer a design defect.

The question of safe design concerning a backup buzzer requires the testimony of an expert. *Cf. Cardullo v. General Motors Corporation,* 378 F. Supp. 890 (E.D. Pa. 1974). Plaintiff's expert merely states that the backup buzzer was "ineffective." This conclusory statement does not suffice to oppose a motion for summary judgment. Furthermore, the expert's statement that the buzzer was ineffective does not create an issue of material fact as to whether the buzzer was defectively designed.

Thus, based upon a thorough examination of the record we conclude that no genuine issue as to any material facts exists with respect to plaintiff's allegations that defendant's failure to provide safety devices proximately caused the decedent's death.

II

The Proximate Cause Argument on the Failure to Warn

Defendant's final assertion in its motion for summary judgment is that a failure to warn of the necessity for mirrors and a backup buzzer could not have proximately caused the accident since these very devices had been installed on the payloader at the time of the accident. In opposition to this motion, plaintiff merely contends that the absence of some kind of warning or instruction constituted a defect which caused the accident.[4]

---

4. Failure to warn is an independent basis of strict liability under Pennsylvania Law. *Greiner,* 540 F.2d at 97, *infra.*

Under Pennsylvania law, a manufacturer of a product has a duty to warn of dangers which he knows, or should know, may result from the foreseeable use of his product. *Pritchard v. Ligget & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961). A warning is not necessary, however, where the party to be warned already knows of the product's dangerous or unsafe propensities. *See Greiner v. Volkswagenwerk Aktiengesellschaft*, 540 F.2d 85 (3d Cir. 1978). Furthermore, the manufacturer's failure to warn must have proximately caused the accident. *Greiner v. Volkswagenwerk Aktiengesellschaft*, 429 F. Supp. 495 (E.D. Pa. 1977). Therefore, the party seeking recovery due to the lack of a warning or instruction, should be required to show that an adequate warning would have caused the individual in question to act differently so as to prevent the harm. *Greiner*, 429 F. Supp. at 499.

Plaintiff alleges that the defendant should have warned the distributor of the dangers of operating a payloader in reverse without rearview mirrors or a backup buzzer. It is undisputed, however, that the distributor installed equipment for safe reverse operation of the payloader. Therefore, the distributor knew of these dangers and a warning was unnecessary to the distributor.

Plaintiff also contends that the defendant should have warned the buyer and the driver of the payloader concerning the dangers of operating the machine without mirrors and a backup buzzer. It is undisputed, however, that the payloader contained these devices when delivered to the buyer and at the time of the accident. This warning, therefore, would not have altered the conduct of these parties.

Additionally, plaintiff contends that the defendant failed to warn the distributor, buyer, and driver of the dangers of operating a payloader in reverse.[5] Certainly, the possibility of

5. Plaintiff's other allegations concerning the defendant's failure to warn do not merit consideration.





striking an individual located to the rear of the payloader while operating in reverse is an obvious danger and a warning is unnecessary.

Plaintiff has presented no material facts which would indicate that a warning by the manufacturer would have prevented the harm to Ronald Clawson. Therefore, the absence of a warning in this case did not proximately cause the accident.

For the foregoing reasons, the record presents no genuine issue as to any material fact with respect to any act or omission on the part of International Harvester which may have proximately caused the death of Robert Clawson. It appearing as a matter of law that International Harvester is not responsible for this accident, summary judgment will be entered in favor of the defendant.

An appropriate order follows.

s/ Barron P. McCune
BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

Dated: April 9, 1979.

cc: Counsel of record.

*Appendix A*

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-1325

SANDRA LOU CLAWSON, Administratrix of the Estate of RONALD EUGENE CLAWSON, Deceased, and SANDRA LOU CLAWSON, in her own right,

Plaintiff

vs.

INTERNATIONAL HARVESTER COMPANY,

Defendant

ORDER

AND NOW, April 9, 1979, the defendant's Motion for Summary Judgment is granted.

s/ Barron P. McCune
BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

cc: Louis M. Tarasi, Esq.
510 Third Avenue
Pittsburgh, Pa. 15219

John E. Kunz, Esq.
25th Floor, Grant Building
Pittsburgh, Pa. 15219



**APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 17, 1979**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-1709

SANDRA LOU CLAWSON, Administratrix of the Estate of Ronald Eugene Clawson, dec'd. and SANDRA LOU CLAWSON in her own right,

Appellant,

vs.

INTERNATIONAL HARVESTER COMPANY

vs.

GRANT STEEL CORPORATION, a corporation

(D.C. Civ. No. 76-1325)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
October 16, 1979
Before: GIBBONS and HIGGINBOTHAM, *Circuit Judges* and WEINER, *District Judge**

---

* Hon. Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

*Appendix B*

LOUIS M. TARASI, JR., ESQ.
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Tarasi & Tighe
510 Third Avenue
Pittsburgh, Pa. 15219

Counsel for Appellant

JOHN E. KUNZ, ESQ.
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Counsel for Appellee

In this diversity wrongful death action the plaintiff appeals from summary judgment in favor of the defendant, a manufacturer of an allegedly defective payloader. We find no genuine issue of material fact, and conclude that the district court properly applied Pennsylvania law.

It is therefore O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed. Costs are taxed in favor of appellee.

BY THE COURT,

s/ John J. Gibbons
Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk



*Appendix B*

DATED: Oct. 17, 1979

Certified as a true copy and issued in lieu
of a formal mandate on November 20, 1979.

Test: M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

## APPENDIX C — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 9, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 79-1709

SANDRA LOU CLAWSON, Administratrix of the Estate of Ronald Eugene Clauson, dec'd. and SANDRA LOU CLAWSON in her own right,

vs.

INTERNATIONAL HARVESTER COMPANY

vs.

GRANT STEEL CORPORATION, a corporation

(D.C. Civil No. 76-1325)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER
*Circuit Judges*

The petition for rehearing filed by Sandra Lou Clawson, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for





rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ John J. Gibbons
Circuit Judge

DATED: November 9, 1979

Supreme Court, U.S.
FILED
FEB 20 1980
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

**October Term, 1978**
**No. 79-1133**

SANDRA LOU CLAWSON, Administratrix of the Estate of RONALD EUGENE CLAWSON, Deceased, and SANDRA LOU CLAWSON, in her own right,

*Petitioner,*

v.

INTERNATIONAL HARVESTER COMPANY,

*Respondent,*

v.

GRANT STEEL CORPORATION, a corporation.

## Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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## STATEMENT OF THE CASE

This statement of the case is necessary to correct an inaccuracy and an omission in the statement of the Petitioner.

First, Petitioner incorrectly states that the Hough payloader backed into the gondola car. There is conflicting deposition testimony that the gondola car crashed into the payloader.

Secondly, Petitioner has failed to disclose that a Petition for Rehearing was filed with the Court of Appeals for the Third Circuit and again, denied.

## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER CAN RAISE AS A CONSTITUTIONAL ISSUE, THE RIGHT TO A JURY TRIAL, WHERE THIS ISSUE HAS NEVER BEEN RAISED EITHER IN THE DISTRICT COURTS OR IN THE THIRD CIRCUIT COURT OF APPEALS?

*Not raised in the courts below.*

II. WHETHER THE SUPREME COURT CAN UNDERTAKE TO REVIEW CONCURRENT FINDINGS OF FACT BY TWO LOWER COURTS IN THE ABSENCE OF A VERY OBVIOUS AND EXCEPTIONAL SHOWING OF ERROR?

*Not raised in the courts below.*

III. WHETHER PETITIONER, IN OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, MAY RELY ON CONCLUSORY AND UNSUPPORTED ALLEGATIONS IN MEETING THE BURDEN OF PRESENTING A GENUINE ISSUE OF MATERIAL FACT?

*Answered in the negative in the court below.*

## REASONS FOR NOT ALLOWING THE WRIT

Petitioner contends that the District Court committed two fundamental errors of law in holding that the plaintiff had the burden of presenting a genuine issue of material fact.[1]

The District Court held that in opposing defendant's Motion for Summary Judgment, the plaintiff was not entitled to rely on conclusory, unsupported allegations in presenting a genuine issue of material fact regarding the absence or inadequacy of safety devices.[2]

> When a Motion for Summary Judgment is made and supported as provided under this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Fed. R. Civ. P. 56(e)

In the District Court's Opinion, Judge McCune succinctly noted that the only affidavit in opposition to the Motion for Summary Judgment, was that of Petitioner's expert. This affidavit contained no facts and the District Court held that conclusory and unsupported allegations were insufficient to oppose a Motion for Summary Judgment. The District Court correctly adhered to the principles of the Federal Rules of Civil Procedure requiring affidavits to be filed which contain *facts* in opposition to a Motion for Summary Judgment.

---

[1]Petitioner first raised this issue as to the burden of presenting a genuine issue of material fact in its Petition for Rehearing. This issue was never raised in the District Court or in the original appeal to the Third Circuit Court of Appeals.

[2]The District Court's Opinion is attached to the Petitioner's Petition for Writ of Certiorari. (See Appendix "A", p. 5(a))



Petitioner avers the District Court substituted trial by affidavit for trial by jury, thus effectively denying plaintiff her Seventh Amendment constitutional right to have her case placed before a jury. Obviously, any time summary judgment is entered in favor of any party, this argument could be raised. Petitioner overlooks the very purpose of summary judgment. Summary judgment is a vehicle to pierce the allegations of the pleading in order to determine whether a genuine issue as to any material facts actually exist.

The 1963 Amendment to Rule 56(e) deals with this situation and requires a response from the non-moving party when a Motion for Summary Judgment is made and properly supported by affidavits and other materials which demonstrate that no triable issues of fact exist. While the burden remains on the moving party to clearly establish the lack of any triable issue in moving for a summary judgment, where the movant sustains his burden, the amended rule requires adequate rebuttal by the non-moving party, even if only to show, pursuant to Rule 56(f), why opposing material is presently unavailable. Petitioner has failed to offer any responsive material demonstrating any triable issues of fact, or why such opposing material is presently unavailable.

The reason for not allowing the Writ is that, on the merits, the lower court has not departed from the acceptable and usual course of judicial proceedings, nor rendered a decision in conflict with a decision of another court. This Court should not entertain this Petition for a Writ of Certiorari.

Further, this Petition should not be allowed on the Petitioner's allegations that the Court of Appeals rendered a decision in direct conflict with the prior decisions of this Court and with decisions of all other United States Courts of Appeal. Again, in reviewing Federal Rule of Civil Procedure 56, dealing with summary judgment, it is clear that the Court

of Appeals for the Third Circuit, did not abuse its discretion in affirming the District Court's decision. The Third Circuit Court of Appeals' affirmance of the District Court's decision is consistent with other Circuit Courts of Appeals' decisions.

In *Schreffler v. Birdsboro Corp.*, 490, F.2d 1148, 1154 (3d Cir. 1974), the court held:

> It matters little whether the plantiff's claim be under Section 402A or negligence because the requirement under both theories is that the defendant's conduct or the defect in its product or design *be a proximate cause of the accident*. Here it is clear that the test was not met. While it is generally true that proximate cause is question for the jury, it is not invariably so. *Where the critical facts are not in issue, the trial judge properly should rule on the question.* (emphasis added)

In *Schreffler, supra*, the Third Circuit Court of Appeals ruled that no disputed material facts existed. Therefore, the only decision remaining was the legal effect of any facts. The trial judge should properly rule on this question, since it becomes one of law. Therefore, the only decision for the trial court judge in that case was the legal effect of any facts. In the case at bar, Judge McCune, as the trial judge, properly found that there were no disputed material facts. All that remained for Judge McCune was the legal effect and Summary Judgment was properly granted.

Where the Court of Appeals affirms the decision of the District Court, the Supreme Court should not undertake to review these concurrent findings of fact, except in the situation where a very obvious, exceptional error is shown. *Berenyi v. District Director, Imm. and Nat. Serv.*, 385, U.S. 630, 636 (1967).

> "The policy underlying the 'two-court' rule is obvious. This Court possesses no emperical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues."



In the absence of a demonstrable, clear error, the reviewing courts will not reverse findings of the trial court. *Sims Consolidated, Ltd. v. Irrigation and Power Equipment, Inc.*, 518 F.2d 413 (10th Cir. 1975). To review the granting of Respondent's Summary Judgment, the Supreme Court would be required to speculate as to the ultimate findings of fact, where the District Court, affirmed by the Court of Appeals, succinctly stated that there were no material facts at issue.

Petitioner has cited *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967), for support of her arguments. There, the District Court's granting of summary judgment was reversed and remanded, since the moving party had failed to meet its burden in showing that no factual issues existed. In that case, summary judgment was filed after three depositions of plaintiff's representatives. The Court acknowledged that none of the deponents seemed to have any knowledge regarding the basic allegations of this lawsuit and as such, it was fantasy to say that these depositions made it quite clear what the truth was. The distinguishing feature, is that, in the instant case, the dependents had considerable knowledge of the events surrounding the accident, as did Petitioner's expert. However, no triable issues of fact existed, with regard to the Motion for Summary Judgment.

Finally, Petitioner raises the constitutional issue of the alleged deprivation of plaintiff's right to a trial by jury, in granting summary judgment. However, it is horn book law that this right exists merely for the determination of a case or controversy. If there is no controversy, then the right to a jury trial does not exist. Examination of the underlying concept of summary judgment reveals that the purpose of this Federal Rule of Civil Procedure is to eliminate lawsuits wherein no factual disputes exist, i.e. controversy. Where no dispute or controversy exists, there is no need for trial by jury. Thus, the constitutional right does not arise.

In *U.S. v. Stangland*, 242 F.2d 843, (7th Cir. 1957), the Seventh Circuit Court of Appeals relied on an earlier decision of the Supreme Court of the United States.

> "... Surely, the granting of a Motion for Summary Judgment where there is no genuine issue of fact is not a denial of the right to trial by jury guaranteed by the Seventh Amendment. *Fidelity & Deposit Co. of Maryland v. U.S.*, 187 U.S. 315, 223 S.Ct. 120, 47 L.Ed. 194." at 848.

Recognizing the earlier Supreme Court mandate, the Petitioner's Writ should not be allowed.

The last reason for not allowing the Writ is that Petitioner initially advanced this constitutional question, the right to trial by jury, in her Petition for Writ of Certiorari. In addition, Petitioner raised the issue with regard to the burden of presenting a genuine issue of material fact in her Petition for Rehearing before the Third Circuit Court of Appeals. Clearly, under the decisions rendered by this Court, the Supreme Court will not ordinarily consider issues raised before it, for the first time, and never considered by the Court of Appeals. Generally, this Court refuses to consider such issues. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, (1970); *U.S. v. Ortiz*, 422 U.S. 898, (1975).



## CONCLUSION

Petitioner has had her day in Court. Summary judgment is proper for the dismissal of meritless claims. In a Petition for Writ of Certiorari, new issues are proscribed and should not be considered.

Respondent respectfully requests that this Court affirm the judgment of the Third Circuit Court of Appeals.

Respectfully submitted:

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK

BY: JOHN E. KUNZ, ESQUIRE

JOHN L. MCINTYRE, ESQUIRE

*Attorneys for Respondent,*
*International Harvester Company.*